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MAYO, TARA L

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte SCOTT D. HARDY

Appeal 2008-6188
Application 10/774,895
Technology Center 3600

Decided: January 29, 2009

Before WILLIAM F. PATE, III, JOHN C. KERINS, and
STEVEN D.A. McCARTHY, *Administrative Patent Judges*.

KERINS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Scott D. Hardy (Appellant) seeks our review under 35 U.S.C. § 134 of the Examiner's final rejection of claims 2-32, the only claims now pending in the application. We have jurisdiction under 35 U.S.C. § 6(b) (2002).

SUMMARY OF DECISION

We AFFIRM.

THE INVENTION

Appellant's claimed invention is to a structure, nominally an inflatable crib, having a base platform, a plurality of inflatable side panels extending vertically from and surrounding the base platform to define an enclosure, and a protective member sealing the inner, inflatable panels from a child placed in the enclosure. (Appeal Br., Claims Appendix, claim 11).

Claims 11 and 30, reproduced below, are representative of the subject matter on appeal.

11. A structure comprising:

a base platform configured to support a child;

a plurality of inflatable side panels extending vertically from and surrounding the base platform, the base platform and side panels defining an enclosure for the child; and

a protective member sealing the inner, inflatable panels from the child.

30. An inflatable crib comprising:

a base platform configured to support a child;

a plurality of inflatable side panels extending vertically from and surrounding the base platform, the base platform and side panels defining an enclosure for the child; and

a protective member for obstructing the child's access to the inflatable panels of the crib, the

protective member sealing the inner, inflatable panels from the child, thereby preventing the child from squirming or rolling into corner regions of the crib where the risk of suffocation is higher should the side panels deflate.

THE REJECTION

The Examiner relies upon the following as evidence of unpatentability:

Fink	US 3,137,870	June 23, 1964
Szego	US 3,763,506	Oct. 9, 1973
Kohus	US 4,739,527	Apr. 26, 1988
Bleser	US 4,815,153	Mar. 28, 1989
Artz	US 5,291,623	Mar. 8, 1994
Bashista	US 5,881,408	Mar. 16, 1999

The Examiner has rejected:

(1) claims 11-14, 19-22, 24-26, and 30-32 under 35 U.S.C. § 103(a) as being unpatentable over Szego in view of Bashista;

(2) claim 15 under 35 U.S.C. § 103(a) as being unpatentable over Szego, Bashista, and Kohus;

(3) claims 16 and 17 under 35 U.S.C. § 103(a) as being unpatentable over Szego, Bashista, Kohus, and Fink;

(4) claims 2-6, 8-10, 18, and 27 under 35 U.S.C. § 103(a) as being unpatentable over Szego, Bashista, and Artz;

(5) claims 23, 28, and 29 under 35 U.S.C. § 103(a) as being unpatentable over Szego, Bashista, and Bleser; and

(6) claim 7 under 35 U.S.C. § 103(a) as being unpatentable over Szego, Bashista, Artz, and Bleser.

ISSUE

The Examiner found that the combined teachings of Szego and Bashista render obvious an inflatable structure/crib having a protective member that seals the inner inflatable panels from a child placed in the crib, wherein the protective member is positioned in a corner region of the crib, and wherein the protective member obstructs a child's access to the inflatable panels of the crib.

Appellant urges that the references do not render obvious the provision of a protective member in a corner region of a crib to obstruct a child's access to the inflatable panels of the crib.

The issue joined in this appeal is: has Appellant established that the combined teachings of Szego and Bashista fail to render obvious a structure/crib having a protective member as claimed?

FINDINGS OF FACT

The following enumerated findings of fact (FF) are supported by at least a preponderance of the evidence. *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1427 (Fed. Cir. 1988) (explaining the general evidentiary standard for proceedings before the Office).

FF 1. The crib liner in the Bashista patent functions as a physical barrier between the crib or portions of the crib and a crib occupant, to prevent the occupant from extending his or her limbs out of the crib between the slats. (Bashista, Figs. 1, 2; col. 1, ll. 53-55; col. 2, ll. 1-4).

FF 2. Appellant's protective member functions as a physical barrier between the crib or portions of the crib and the crib occupant. (Specification, p. 5, ll. 26-27; p. 5, l. 31-p. 6, l. 1; Fig. 7).

FF 3. Appellant does not contest that, in a crib of the type disclosed in Szego, as modified to include a liner as disclosed in Bashista, the liner in the modified crib will achieve the predictable result of containing, within the crib interior, the limbs of a child placed in the crib. Appellant instead responds to the Examiner's determination that Bashista in combination with Szego yields a predictable result of containing a child's limbs within the crib interior by arguing that "the crib liner in Bashista does not perform the same function as the appellant's protective member". (Reply Br. 4).

FF 4. The crib liner in the Bashista patent includes side panels and end panels that extend up the interior of the side and end members of the crib, with the adjoining edges of the side and end panels being fastened to one another at the interior of the corners of the crib, presenting a physical barrier or obstruction to the panels and the corner regions of the crib. (Bashista, Figs. 1, 2; col. 4, ll. 5-6).

FF 5. The Specification describes that webbing 31 is "attached at corner regions of the crib." (Specification, p. 5, ll. 27-28). Fig. 7 shows the webbing 31 attached at the regions where and at which two vertically extending side panels 12 are joined. The webbing 31 obstructs access to the juncture of the two panels. (Specification, p. 5, l. 26-p. 6, l. 1).

PRINCIPLES OF LAW

"Section 103 forbids issuance of a patent when 'the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.'" *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, ___, 127 S. Ct. 1727, 1734 (2007). The question of obviousness is resolved on

the basis of underlying factual determinations including (1) the scope and content of the prior art, (2) any differences between the claimed subject matter and the prior art, (3) the level of skill in the art, and (4) where in evidence, so-called secondary considerations. *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966). *See also KSR*, 550 U.S. 398 at ___, 127 S. Ct. at 1734 (“While the sequence of these questions might be reordered in any particular case, the [*Graham*] factors continue to define the inquiry that controls.”).

ANALYSIS

Appellant argues claims 11-14, 19-22, and 24-26 as a single group, all claims standing or falling with independent claim 11. (Appeal Br. 5).

Appellant argues separately for the patentability of claim 30, and of claim 31, with claim 32 standing or falling with claim 31. (Appeal Br. 7-8).

Appellant presents the remaining claims under separate headings (iv)-(viii), corresponding to the separate grounds of rejection lodged against those claims (*see* (2)-(6) under the heading “THE REJECTION” above). For these claims, Appellant expressly relies on the arguments presented for the patentability of claim 11, and includes a statement that the reference or references cited in addition to the Szego and Bashista patents do not cure the alleged deficiencies in the initial combination of the teachings of those two patents. (Appeal Br. 8-9).

Claims 11-14, 19-22, and 24-26

Independent claim 11 will be taken as the representative claim for this group. Appellant initially argued that the rejection of claim 11 was in error, in that the Examiner allegedly failed to identify the motivation necessary to

combine the teachings of Szego and Bashista, and thus the reasoning that was set forth amounted to the use of impermissible hindsight reconstruction of the claimed invention. (Appeal Br. 6). The Examiner responded that the modification to the inflatable crib of Szego to include the crib liner of Bashista is a combination that unites those known elements to yield a predictable result, namely, the containment of a child's limbs within the crib interior. (Answer 12). Noting that this rationale presented by the Examiner had its genesis in the then recently-decided *KSR* case, Appellant countered that the claimed invention is more than a predictable use of prior art elements (Reply Br. 3), and that the Examiner failed to meet the burden imposed in the post-*KSR* Examination Guidelines of establishing that, in the combination, each element merely would have performed the same function as it did separately. (Reply Br. 4).

Appellant, in an effort to establish this latter contention (i.e., that the Examiner's burden was not met), contrasts the purpose or function of the Bashista crib liner to the alleged purpose or function of the Appellant's claimed protective member, asserting that the functions performed by the two are different. (*Id.*). That is not the proper inquiry in assessing the propriety of the rejection; rather, the proper inquiry is whether the Bashista crib liner will perform the same function in the Szego crib as it does in the Bashista crib. Moreover, even if such a contrasting or comparison were relevant, the liner disclosed in Bashista and the claimed protective member both function as physical barriers between the crib or portions thereof and the crib occupant (FF 1, 2), and Appellant's assertions are unavailing.

The Examiner states that the predictable result in the combination is that the limbs of a child placed in the Szego crib (modified to include the

Bashista liner) will be contained by the liner or barrier within the crib interior (Answer 12), a point not contested by Appellant. (FF 3). That is the same function provided by the Bashista crib liner in the Bashista crib. (FF 1). Further, as noted above, the claimed protective member operates, in the same manner, as a physical barrier. Appellant has not established that the Examiner failed to meet his burden of establishing a prima facie case of obviousness. Appellant further points to no evidence or reasoning in support of the assertion that the claimed invention involves more than the predictable use of prior art elements. No other persuasive arguments are presented that attempt to establish error in the Examiner's rejection. The rejection of claims 11-14, 19-22 and 24-26 under 35 U.S.C. § 103(a) over Szego in view of Bashista will be sustained.

Claim 30

Appellant contends that, in addition to the reasons advanced for the patentability of claim 11, the Szego and Bashista references fail to disclose a protective member that "prevent[s] the child from squirming or rolling into the corner regions of the crib where the risk of suffocation is higher should the side panels deflate". (Appeal Br. 7, Claims Appendix, claim 30; Reply Br. 4-6). The Examiner takes the position that the crib liner of Bashista as used in the crib structure of Szego is capable of performing that function, and that the claim does not otherwise structurally distinguish the invention over the prior art. (Answer 12).

Appellant twice advances the argument that the Examiner has conceded that Szego fails to teach the provision of a protective member, and that Bashista does not contemplate the possibility of collapse of a portable

crib. (Appeal Br. 7; Reply Br. 5). This is nothing more than an attack on the references individually, and is not germane to the issue of the patentability of the claims over the combined teachings of the references. *See In re Keller*, 642 F.2d 413 (CCPA 1981)(nonobviousness can not be shown by attacking references individually where rejection is based on combination of references).

Appellant further contends that Bashista, relied on by the Examiner as meeting the claim elements directed to the claimed protective member, does not disclose any structure which prevents a child from squirming or rolling into corner regions of the crib. (Reply Br. 5). This function, according to the language employed in claim 30, is obtained by providing a protective member for obstructing a child's access to the inflatable panels of the crib and sealing the inflatable panels from the child. (Appeal Br., Claims Appendix, claim 30). The Bashista protective liner has side panels and end panels that extend up the interior of the side and end members of the crib, and the adjoining edges are joined by zippers at the interior of the corners of the crib. (FF 4). The Bashista liner thus obstructs a child's access to the panels of the crib at the corner regions, and seals the panels from the child. (*Id.*).

Appellant points out that, in the Bashista crib, the mattress is placed inside the liner, and that a space would exist between the crib liner and the mattress. (Reply Br. 6). Appellant argues that this evidences that the crib liner would not prevent the child from squirming or rolling into the corner regions of the crib. (*Id.*). This appears to be an attempt by Appellant to have an overly restrictive meaning attached to the term "corner region[s] of the crib". While Appellant does not provide a specific definition of "corner"

as it pertains to the crib, the Specification and drawings clearly convey that the corner region of the crib is the region where two vertical side panels 11 are joined. (FF 5). As the Bashista protective liner joins the side and end panels of the liner at the interior of the vertical corner regions of the crib, the liner will prevent a child from accessing the corner regions of the crib.

The rejection of claim 30 as being unpatentable over Szego and Bashista will be sustained.

Claims 31 and 32

Claim 31 depends from claim 11, and explicitly recites that the protective member is positioned at a corner region of the structure (crib). Appellant urges that the protective liner disclosed in Bashista “is not located in a corner region of the crib, but is instead disposed beneath the mattress and extends upwardly along the sides of the mattress.” (Reply Br. 7). Appellant further asserts that persons of ordinary skill in the art would understand, without need for a specific definition, what constitutes the claimed “corner region” of the claimed structure. (*Id.*).

As noted in the preceding section, we agree with Appellant’s latter contention that persons of ordinary skill in the art would appreciate and understand the meaning of the term, “corner region”. Appellant’s Specification and drawings evidence that the corner regions of the structure are the junctures of the vertically extending side panels 12, with the protective members 31 joined to those side panels and obstructing access to the junctures. (FF 5). The Bashista protective liner extends along the vertical juncture of the sides and ends of the crib, and the side and end panels of the liner are fastened together by zippers along their edges. The

Bashista liner is thus indeed located at the corner regions of the crib.

Appellant's attempt to distinguish the Bashista reference by providing a less-than-complete description of the position and construction of the protective liner of Bashista is unpersuasive.

The rejection of claims 31 and 32 will be sustained.

Claim 15

Claim 15 is rejected as being unpatentable over a combination of the teachings of Szego, Bashista, and Kohus. Appellant argues that Kohus does not cure the deficiencies alleged to be present in the combination of the teachings of Szego and Bashista. We do not find the Szego/Bashista combination to be deficient in rendering obvious claim 11, thus we are not persuaded that the Examiner erred in rejecting claim 15.

Claims 16 and 17

Claims 16 and 17 are rejected as being unpatentable over Szego, Bashista, Kohus, and Fink. Appellant argues that Kohus and Fink do not cure the deficiencies alleged to be present in the combination of the teachings of Szego and Bashista. We do not find the Szego/Bashista combination to be deficient in rendering obvious claim 11, thus we are not persuaded that the Examiner erred in rejecting claims 16 and 17.

Claims 2-6, 8-10, 18 and 27

Claims 2-6, 8-10, 18, and 27 are rejected as being unpatentable over Szego, Bashista, and Artz. Appellant argues that Artz does not cure the deficiencies alleged to be present in the combination of the teachings of

Szego and Bashista. We do not find the Szego/Bashista combination to be deficient in rendering obvious claim 11, thus we are not persuaded that the Examiner erred in rejecting claims 2-6, 8-10, 18, and 27.

Claims 23, 28 and 29

Claims 23, 28, and 29 are rejected as being unpatentable over Szego, Bashista, and Bleser. Appellant argues that Bleser does not cure the deficiencies alleged to be present in the combination of the teachings of Szego and Bashista. We do not find the Szego/Bashista combination to be deficient in rendering obvious claim 11, thus we are not persuaded that the Examiner erred in rejecting claims 23, 28 and 29.

Claim 7

Claim 7 is rejected as being unpatentable over Szego, Bashista, Artz, and Bleser. Appellant argues that Artz and Bleser do not cure the deficiencies alleged to be present in the combination of the teachings of Szego and Bashista. We do not find the Szego/Bashista combination to be deficient in rendering obvious claim 11, thus we are not persuaded that the Examiner erred in rejecting claim 7.

CONCLUSION

Appellant has not established that reversible error exists in the rejections of claims 2-32 under 35 U.S.C. § 103(a).

ORDER

The Examiner's decision to reject claims 2-32 is affirmed.

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No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

JRG

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